Public Prosecutor v Oladotun Lukmaru Umaru & Ors

HIGH COURT (PENANG) — CRIMINAL REVISION NO 43-15-90
EDGAR JOSEPH JR J
4 SEPTEMBER 1990

Criminal Procedure — Transmission of trial to High Court — No prior consent or requisition of public prosecutor obtained — Whether order correct — Dangerous Drugs Act 1952, ss 39 & 41A

In this revision, the sole question for decision was whether the learned magistrate, Butterworth, was right in making an order, purportedly under s 41A(1) of the Dangerous Drugs Act 1952 ('the Act'), whereby he transmitted to the High Court, for trial, the case of six accused persons — all Nigerian nationals — whom he had previously remanded in custody on charges of trafficking in dangerous drugs, to wit, heroin, in contravention of s 39B, notwithstanding that no prior consent or requisition of the public prosecutor for such transfer had been obtained.

Held, quashing the order for transmission:

(1) The provisions of the proviso to s 39B(3), in particular, the last 11 words, state, by way of exception that after an accused is remanded in custody then he 'shall not be further prosecuted until the consent of the public prosecutor has been obtained'. These quoted words were overlooked all round both in the court below and in the present case. When a magistrate makes an order for transmission under s 41A(1) that event although a judicial event, is a further step in the prosecution of the accused. It follows that that further step is barred until and unless the prior consent of the public prosecutor has been obtained.

(2) Furthermore, the requirement of a consent of the public prosecutor is a well known safeguard for an accused person charged with certain of the graver offences as it ensures that he is not exposed to the risk of such a prosecution without the intervention of the public prosecutor who may, after applying his mind to the circumstances of the particular case, exercise his discretion by refusing a consent, in which event, the High Court will have no jurisdiction to try the accused for that offence. It follows that the order made by the learned magistrate, if allowed to stand, would have the effect of depriving the accused persons in this case of that safeguard.

[Bahasa Malaysia summary

Di dalam ulangbicara ini, soalan tunggal untuk keputusan ialah samada majistret, Butterworth, betul dalam membuat perintah, kononnya di bawah s 41A(1) Akta Dadah Berbahaya 1952 ('Akta itu'), dengan mana beliau memindahkan kes enam orang yang tertuduh ke Mahkamah Tinggi untuk perbicaraan, walaupun persetujuan atau permohonan pendakwa raya untuk pemindahan itu tidak diperolehi terlebih dahulu. Enam orang yang tertuduh itu yang kesemuanya adalah warganegara Nigeria telah ditahan oleh beliau atas tuduhan mengedar dadah berbahaya, iaitu heroin, berlawanan dengan s 39B.

Diputuskan, membatalkan perintah pemindahan itu:

(1) Peruntukan proviso kepada s 39(B)(3), terutamanya 11 perkataan yang terakhir, menyatakan secara pengecualian bahawa selepas seorang yang tertuduh ditahan, beliau 'shall not be further prosecuted until the consent of the public prosecutor has been obtained'. Perkataan-perkataan dalam petikan itu gagal dilihat oleh semua pihak di mahkamah bawah dan dalam kes ini. Bila seorang majistret membuat perintah pemindahan di bawah s 41A(1), kejadian itu walaupun satu kejadian kehakiman, adalah satu langkah lanjut dalam pendakwaan yang tertuduh. Jadi, langkah lanjut itu dihalang sehingga dan kecuali jikalau persetujuan terdahulu pendakwa raya telah diperolehi.

(2) Lagipun, peruntukan tentang persetujuan pendakwa raya adalah satu perlindungan yang terkenal untuk seorang yang dituduh dengan setengah kesalahan yang serius kerana ia memastikan bahawa orang itu tidak dibiarkan menanggung risiko pendakwaan sedemikian tanpa tindakan pendakwa raya yang, setelah memakai fikirannya dalam keadaan sesuatu kes itu, boleh menggunakan budi bicaranya untuk enggan memberi persetujuan. Jika ini berlaku, Mahkamah Tinggi tidak ada bidang kuasa untuk membicarakan orang yang tertuduh itu. Ini bermakna bahawa perintah majistret itu, jika dibenarkan berterusan, akan merampas perlindungan itu daripada orang-orang yang tertuduh dalam kes ini.]

Cases referred to

1 *Re the Central Provinces and Berar Act* [1939] FCR 18 (folld)
2 *James* v *Commonwealth of Australia* [1936] AC 578 (folld)
3 *Perumal* v *PP* [1970] 2 MLJ 265 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 39, 41A

Karpal Singh for the applicants.
Ahmad bin Haji Maarof (Deputy Public Prosecutor) for the respondents.

Cur Adv Vult

Edgar Joseph Jr J: In this revision, the sole question for decision was whether the learned magistrate, Butterworth, was right in making an order, purportedly under s 41A(1) of the Dangerous Drugs Act 1952 ('the Act'), whereby he transmitted to the High Court, for trial, the case of six accused persons — all Nigerian nationals — who he had previously remanded in custody on charges of trafficking in dangerous drugs, to wit, heroin, in contravention of s 39B, notwithstanding that no prior consent or requisition of the public prosecutor for such transfer had been obtained.

In making that order the learned magistrate had acceded to a submission by counsel for the accused persons who, incidentally, was supported on this point by the prosecuting officer from the Customs Department.

The starting point of my enquiry must, of course, be s 41A(1) which reads as follows:

> Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

Clearly, if s 41A(1) of the Act is read in isolation, there are two events, namely, when the charge relates to an offence triable exclusively in the High Court or when the public prosecutor requires the accused to be tried in the High Court, either of which empowers the appropriate subordinate court to transmit the case for trial in the High Court, without holding a preliminary enquiry under Chapter XVII of the Criminal Procedure Code (FMS Cap 6). In making the order for transmission the learned magistrate was no doubt swayed by the consideration that the offences charged being punishable on conviction by the mandatory sentence of death were triable exclusively in the High Court, and so there was no requirement for a prior consent or requisition.

But, it is well to remember the salutary advice of Gwyer CJ in *Re the Central Provinces and Berar Act*[1] at p 42:

> A grant of power in general terms standing by itself would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.

To the same effect were the words of Lord Wright in *James* v *Commonwealth of Australia*,[2] when he said:

> The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read out in vacuo but as occurring in a single complex instrument, in which one part may throw light on another.

Having thus reminded myself as to the correct approach to be adopted in considering the question aforesaid, I would direct attention to s 39B(3) and (4) of the Act which read:

> (3) A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor:
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> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case *shall not be further prosecuted until the consent has been obtained.* (Emphasis supplied.)
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> (4) When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly.

A preliminary question which arises is: when is a prosecution instituted? It is answered for me in *Perumal* v *PP*[3] wherein the Federal Court had to consider s 26(1) of the Prevention of Corruption Act 1961, which is in pari materia with s 39B(3) of the Act. In that case, Suffian FJ, speaking for the court, said that a prosecution is instituted when an accused person is called upon to plead to the charge.

The first impression one therefore gets on reading s 39B(4) is that since it prohibits an accused from even being called upon to plead to the charge before the public prosecutor has consented to his prosecution, it would be sufficient if the required consent is produced in the High Court, it being the court with exclusive jurisdiction to try capital offences. This is a consideration which would seem to reinforce the position taken by the learned magistrate who had relied on s 41A(1).

But, reflection reveals that that impression is a false one, for the provisions of the proviso to s 39B(3), in particular, the last 11 words, state, by way of exception that after an accused is remanded in custody then he 'shall not be further prosecuted until the consent of the public prosecutor has been obtained'. These quoted words were overlooked all round both in the court below and before me. In my view when a magistrate makes an order for transmission under s 41A(1), that event although a judicial event, is a further step in the prosecution of the accused. It follows that that further step is barred until and unless the prior consent of the public prosecutor has been obtained.

I am fortified in this, by the consideration that the requirement of a consent of the public prosecutor, is a well known safeguard for an accused person charged with certain of the graver offences as it ensures that he is not exposed to the risk of such a prosecution without the intervention of the public prosecutor who may, after applying his mind to the circumstances of the particular case, exercise his discretion by refusing a consent, in which event, the High Court will have no jurisdiction to try the accused for that offence. It follows that the order made by the learned magistrate, if allowed to stand, would have the effect of depriving the accused persons in this case of that safeguard.

Accordingly, the order for transmission being a nullity for jurisdictional error, was quashed, and the case remitted to the magistrates' court, Butterworth, with a direction that it be dealt with according to law.

Order accordingly.

Solicitors: *Karpal Singh & Co.*

Reported by *Kevin Mathews*